No. 25-1779

IN THE

SUPREME COURT OF THE UNITED STATES

PACT AGAINST CENSORSHIP, INC., ET AL.,
Petitioner,

v.

KIDS INTERNET SAFETY ASSOCIATION, INC., ET AL.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

TEAM NUMBER 37
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Constitutional Provisions

Other Authorities

QUESTIONS PRESENTED

1. Whether Congress violated the constitutional principles of the private nondelegation doctrine by granting broad independent enforcement powers to the Kids Internet Safety Association and providing the Federal Trade Commission minimal supervision.

2. Whether Rule ONE impermissibly infringes on the First Amendment by requiring websites with some adult entertainment content to employ age verification technology for all users.

OPINIONS BELOW

The orders and opinions of the United States District Court for the District of Wythe are unreported and not reproduced in the record. The district court denied the Petitioner Pact Against Censorship, Inc.'s request for a preliminary injunction against the operation of the Kids Internet Safety Association (hereinafter "KISA"), finding no violation of the private nondelegation doctrine. R. at 5. The district court then granted the preliminary injunction against Rule ONE, employing strict scrutiny and finding that the rule's overbroad application violated the First Amendment. R. at 5.

The opinion of the United States Court of Appeals for the Fourteenth Circuit is unreported but reproduced in the record. R. at 1–15. The Court affirmed the district court's holding that the delegation of authority to KISA did not violate the private nondelegation doctrine because it was properly subordinated to the Federal Trade Commission. R. at 2–6. In finding that Rule ONE passed rational basis review, the Court reversed and remanded the district court's decision that Rule ONE violated the First Amendment, with instructions to vacate the injunction. R. at 9–10.

In a dissenting opinion, Judge Marshall wrote that KISA's enforcement powers contravene the private nondelegation doctrine because the Federal Trade Commission's review was superficial, the Commission does not supervise KISA, and KISA has more independent power than other valid self-regulatory organizations. R. at 11–13. Judge Marshall also argued that Rule ONE must be assessed under strict scrutiny rather than rational basis review. R. at 13–14. Finding Rule ONE to be both underinclusive and over restrictive, Judge Marshall would have deemed it unconstitutional under the First Amendment. R. at 14–15.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. art. I, § 1, cl. 1 provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

U.S. Const. art. II, § 1, cl. 1 provides:

> The executive Power shall be vested in a President of the United States of America.

U.S. Const. art. III, § 1, cl. 1 provides:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

15 U.S.C. § 78o-3(k)(1), in part, provides:

> A futures association registered under section 17 of the Commodity Exchange Act shall be a registered national securities association for the limited purpose of regulating the activities of members who are registered as brokers or dealers in security futures products pursuant to section 15(b)(11).

15 U.S.C. § 78s(d)(2), in part, provides:

> Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine.

15 U.S.C. § 3052, in part, provides:

> (a) The private, independent, self-regulatory, non-profit corporation, to be known as the "Horseracing Integrity and Safety Authority," is recognized for purposes of developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program for covered horses, covered persons, and covered horseraces.
>
> . . .

> (e) To avoid conflicts of interest, the following individuals may not be selected as a member of the Board or as an independent member of a nominating or standing committee under this section:
>
> > (1) An individual who has a financial interest in, or provides goods and services to, covered horses.
> >
> > (2) An official or officer—
> >
> > > (A) of an equine industry representative; or
> > >
> > > (B) who serves in a governance or policymaking capacity for an equine industry representative
> >
> > (3) An employee of, or an individual who has a business or commercial relationship with, an individual described in paragraph (1) or (2)
> >
> > (4) An immediate family member of an individual described in paragraph (1) or (2).

15 U.S.C. § 3053, in part, provides:

> (a) The Commission, by rule in accordance with section 553 of title 5, may abrogate, add to, and modify the rules of the Authority promulgated in accordance with this chapter as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this chapter and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this chapter.
>
> . . .
>
> (e) The Authority shall seek to enter into an agreement with the United States Anti-Doping Agency under which the Agency acts as the anti-doping and medication control enforcement agency under this chapter for services consisted with the horseracing anti-doping medication control program.

47 U.S.C. § 231, in part, provides:

> Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.

Ind. Code Ann. § 24-4-23-1, in part, provides:

> Adult oriented website" means a publicly accessible website that publishes material harmful to minors, if at least one-third (1/3) of the images and videos published on the website depict material harmful to minors.

Tex. Gen. Laws 676, in part, provides:

> "Sexual material harmful to minors" includes any material that:

(A) the average person applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal to or pander to the prurient interest;

(B) In a manner patently offensive with respect to minors, exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated displays or depictions of:

(i) a person's pubic hair, anus, or genitals or the nipple of the female breast;

(ii) touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or

(iii) sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

. . .

(a) A commercial entity that knowingly and intentionally publishes or distributes

material on an Internet website, including a social media platform, more than one-third of which is sexual material harmful to minors, shall use reasonable age verification methods as described by Section 129B.003 to verify that an individual is 18 years of age or older.

. . .

(b) A commercial entity that knowingly and intentionally distributes material on an Internet website or a third party that performs age verification under this chapter shall require an individual to:
    (1) provide digital identification; or
    (2) comply with a commercial age verification system that verifies age using:
        (A) government-issued identification; or
        (B) a commercially reasonable method that relies on public or private transactional data to verify the age of an individual on public or private transactional data to verify the age of an individual.

. . .

(b) A civil penalty imposed under this section for a violation of Section 129B.002 or 129B.003 may be in an amount equal to not more than the total, if applicable, of:

(1) $10,000 per day that the entity operates an Internet website in violation of the age verification requirements of this chapter;

(2) $10,000 per instance when the entity retains identifying information in violation of Section 129B.002(b); and

(3) if, because of the entity's violation of the age verification requirements of this chapter, one or more minors accesses sexual material harmful to minors, an additional amount of not more than $250,000.

55 C.F.R. § 1.

55 C.F.R. § 2.

55 C.F.R. § 3.

55 C.F.R. § 4.

55 C.F.R. § 5.

55 U.S.C. § 3050.

55 U.S.C. § 3051.

55 U.S.C. § 3052.

55 U.S.C. § 3053.

55 U.S.C. § 3054.

55 U.S.C. § 3057.

55 U.S.C. § 3058.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Congress passed the Keeping the Internet Safe for Kids Act (hereinafter "KISKA" or "the Act") to prevent children's exposure to explicit sexual material online. R. at 2. The Act, which was intended to "keep the Internet accessible and safe for American youth," became effective in January 2023. R. at 2. 55 U.S.C. § 3050(a). To allow KISKA's regulatory scheme to evolve alongside the Internet and account for novel safety concerns as they arise, Congress created the Kids Internet Safety Association (hereinafter "KISA" or "the Association")—a "private, independent, self-regulatory non-profit corporation." R. at 2. 55 U.S.C. §§ 3051(a), 3052(a). Congress modeled KISA after the Horseracing Integrity and Safety Authority (hereinafter "the Authority"), a private entity created by Congress to regulate the horseracing industry. R. at 2.

The Act establishes the basis for KISA's funding and membership and includes a conflicts of interest provision. 55 U.S.C. § 3052. The Association is funded by loans, as well as the fees and fines imposed by the organization. 55 U.S.C. § 3052(f). It is governed by a board of directors—with five independent members and four from various technological constituencies—all of whom are originally selected by an independent nominating committee comprised of non-technological constituencies. 55 U.S.C. § 3052(b), 3052(d).

KISA has both independent rulemaking and enforcement powers. R. at 3. Especially relevant is KISA's authority to prescribe rules or rule modifications regulating the entire Internet industry and relating to "permitted and prohibited content for consumption by minors;" "website safety standards;" "a description of best practices for families;" "a schedule of civil sanctions for violators;" and "a process [] for disciplinary hearings," among other things. 55 U.S.C. § 3053(a). KISA enforces its rulemaking through investigations of potential violators, which can lead to the imposition of civil sanctions or the filing of civil actions for injunctive relief. R. at 3. 55 U.S.C.

§ 3054(c). Per 55 U.S.C. § 3054(e), KISA may also seek enforcement assistance from non-profit child protection organizations.

The Act tasks the Federal Trade Commission (hereinafter "FTC" or "the Commission") with overseeing KISA. R. at 2. 55 U.S.C. § 3053. The FTC's limited supervisory powers include minimal independent rulemaking, the power to "abrogate, add to, and modify" KISA's rules, and *de novo* review of enforcement actions brought by KISA before an administrative law judge. R. at 3. 55 U.S.C. §§ 3053(e), 3058. The FTC has only exercised its power of *de novo* review once before, ultimately deciding not to "affirm, reverse, modify, set aside, or remand for further proceedings" the original outcome of the enforcement action. R. at 2. 55 U.S.C. § 3058(c)(3)(A)(i). It is unclear whether the FTC has ever exercised its other supervisory powers over KISA. R. at 2.

Pursuant to its rulemaking authority, KISA issued the regulation known as Rule ONE in June 2023. R. at 3–4. The rule was inspired by KISA's consideration of the effects of exposure to pornography on minors. R. at 3. In meetings with "experts," KISA grew concerned that such exposure could be linked to "gender dysphoria," "a drop in grades," and depression or aggression among youth. R. at 3. The purported solution came via Rule ONE's requirement that websites and commercial entities use age verification technology to ensure only adults can access explicit materials. R. at 3. As part of its enforcement authority, KISA can exercise its investigatory power to identify violators of the rule, impose fines up to $10,000 per day or per violation—additionally fining violators up to $250,000 if a minor accesses a covered site or commercial entity due to noncompliance—and file suit for injunctive relief. R. at 4. 55 C.F.R. § 4.

Rule ONE applies to websites and commercial entities that "knowingly and intentionally" publish and distribute content "more than one-tenth of which is sexual material." R. at 3–4. 55 C.F.R. § 1. User age is to be verified by government-issued ID or other transactional data, but

retention of users' identifying information is prohibited. R. at 3. 55 C.F.R. §§ 2, 3. Notably, expert affidavits reveal that the efficacy of age verification technology as opposed to content filtering software is dubious, given that even inexpert youth can bypass the requirements. R. at 5.

Following Rule ONE's enactment, Jane and John Doe stopped visiting their once frequented online adult media sites due to their concern that the newly implemented age verification technology will place their personal data at risk of being stolen by hackers. R. at 4. Because Jane is not comfortable with the alternative of obtaining these materials from brick-and-mortar stores, she no longer has a trustworthy and accessible means to access adult entertainment. R. at 4. Jane's experience is not unique, as similar age verification laws at the state level have resulted in a significant reduction in consumers of the online adult entertainment industry. R. at 4. Further, per evidence submitted by Petitioner Pact Against Censorship, Inc. (hereinafter "PAC"), most sites subjected to the rule's requirements offer extensive "non-objectionable material." R. at 4. Given the potential for nationwide declines in traffic to websites employing age verification technology, this material may now go untapped by former and future users. R. at 4.

II. PROCEDURAL HISTORY

On August 15, 2023, Petitioners PAC, Jane and John Doe, and Sweet Studios, L.L.C., filed suit against KISA and the FTC to permanently enjoin both KISA and Rule ONE's continued operation. R. at 5. PAC is the largest trade association for the American adult media industry, of which Jane Doe, John Doe, and Sweet Studios are members. R. at 5. Both the courts below found the parties to have standing. R. at 5. The District Court for the District of Wythe granted the preliminary injunction only against Rule ONE, finding that KISA did not violate the private nondelegation doctrine but that Rule ONE did violate the First Amendment. R. at 5. KISA appealed the district court's decision on Rule ONE, and PAC cross-appealed on the issue of whether KISA violates the private nondelegation doctrine. R. at 5. The United States Court of Appeals for the

Fourteenth Circuit affirmed the lower court's nondelegation decision and reversed and remanded the First Amendment decision with instructions to vacate the injunction against Rule ONE. R. at 10. PAC appealed to the United States Supreme Court, which granted certiorari. R. at 16.

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit erroneously held that KISA did not violate the private nondelegation doctrine due to a misrepresentation of the FTC's surveillance powers over the entity. Although the FTC's revisionist power over KISA's rulemaking properly oversees and subordinates the entity's legislative authority, that power does not extend to KISA's enforcement capacity. Further, the FTC's power of *de novo* review over KISA's enforcement actions is too restricted and insulated to constitute meaningful control. As a result of the FTC's deficient supervision, KISA can take extensive action against the entire Internet industry for purported violations of its rules without any accountability. This prospect is potentially ruinous for PAC members operating online, who should not be forced to pay exorbitant fines to an unaccountable private entity that is incentivized to pursue the demise of all adult media operations. Thus, KISA violates the private nondelegation doctrine because, under KISKA, it is free to act with impunity when enforcing its rulemaking against its competitors, unbeholden to the supervision of a superior government entity.

Additionally, the Fourteenth Circuit incorrectly applied rational basis review in its assessment of Rule ONE's constitutionality. In contrast to cases applying rational basis review for obscene—and therefore, unprotected—material, Rule ONE constitutes a content-based restriction on non-obscene sexual content by placing severe deterrents on access to Internet sites that house even one-tenth adult entertainment content. Because speech recognized under the First Amendment is afforded constitutional protections of the highest order, a policy that threatens those

rights based on its promulgated message constitutes a content-based restriction, which is subject to the most exacting standard of review. Thus, Rule ONE must be evaluated under strict scrutiny.

Applying the proper standard of review, Rule ONE evidently violates the First Amendment. Rule ONE is not narrowly tailored, nor is it the least restrictive means of achieving the Government's purported interest of restricting youth access to adult entertainment materials. For one, Rule ONE's overbroad reach strongly deters adult access to material protected under the First Amendment. The rule triggers age verification for any website containing at least ten percent "sexual material harmful to minors," a requirement so outsized that it engulfs even social media platforms containing a variety of constitutionally protected speech. The District Court for the District of Wythe adeptly accepted that multiple less restrictive alternatives to Rule ONE would be at least as effective in achieving the Act's purposes. Rule ONE further fails strict scrutiny by overlooking the various ways in which minors can easily access harmful materials online in lieu of operating age verification technology. Thus, as a result of its overbroad and underinclusive effects, Rule ONE fails strict scrutiny and impermissibly infringes on the First Amendment.

ARGUMENT

The constitutionality of federal legislation and free speech restrictions are both questions of law. Therefore, both are to be reviewed *de novo*. See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011); Speaks v. Kruse, 445 F.3d 396, 399 n.8 (5th Cir. 2006). The Government bears the burden of showing the constitutionality of a challenged law. United States v. Playboy Ent. Grp., 529 U.S. 803, 817 (2000). Further, the Court accepts well-pleaded facts as true, viewing them in the light most favorable to the plaintiff (herein, Petitioner). Whitley v. Hanna, 726 F.3d 631, 637 (5th Cir. 2013).

KISA's overbroad and insufficiently surveilled enforcement powers violate the private nondelegation doctrine, and Rule ONE impermissibly infringes on First Amendment freedoms. As a result, the Court must find both KISA and Rule ONE unconstitutional.

I. KISA VIOLATES THE PRIVATE NONDELEGATION DOCTRINE BY PLACING ENFORCEMENT POWER IN THE HANDS OF A PRIVATE ENTITY WITHOUT SUFFICIENT OVERSIGHT BY A PUBLIC ENTITY.

The nondelegation doctrine developed to ensure that each branch's responsibilities are exercised by none other than those to whom the power was originally endowed. It follows from the first sections of Articles 1, 2, and 3 (hereinafter "Vesting Clauses") of the United States Constitution, which enshrine the separation of powers by vesting the legislative, executive, and judicial powers exclusively in their respective arms of government. U.S. Const. art. I, § 1, cl. 1; art. II, § 1, cl. 1; art. III, § 1, cl. 1. See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (acknowledging the formalist position that the Constitution's text prohibits delegation). The nondelegation doctrine's restrictions not only preserve the nation's constitutional structure, but also ensure that only those democratically accountable to the public wield significant influence over private rights. See id. ("Those who govern the People must be accountable to the People.").

Despite these formalist arguments, the Court has conceded that the delegation of power to public authorities—such as administrative agencies—is a functional necessity that can be constitutionally achieved if properly limited. Thus, Congress can delegate the power to "fill up the details" of a regulatory framework to said agencies, so long as "essential legislative functions" are not altogether abdicated. See Currin v. Wallace, 306 U.S. 1, 10–15 (1939). But see J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (establishing the requirement that Congress provide an intelligible—or limiting—principle in prescribing delegations of power to public authorities). However, in the seminal case A. L. A. Schechter Poultry Corp. v. United States, the Court recognized that because delegation to *private* entities affirmatively places constitutionally

vested power beyond the ambit of governmental control and public accountability, such statutory schemes warrant a distinct set of constitutional justifications and doctrinal inquiries. 295 U.S. 495, 537 (1935) (emphasizing that delegation to private entities poses the unique risk of allowing self-interested parties to establish trade and industry standards in contravention to public interest).

A. The Private Nondelegation Doctrine Exists to Prevent Abuses of Power by Self-Interested Parties like KISA.

The Court has historically been apprehensive about the delegation of *any* authority to a private entity not only because of its conflicts with the Constitution's text, but also because of the skewed incentives that arise from authorizing private parties to define the rights of others, and especially of their competitors. Compare Currin, 306 U.S. at 15 (finding no violation of the private nondelegation doctrine because the statutory scheme merely invited the input of industry members as a condition of congressional action) with Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (delegating the authority to "fix maximum hours of labor" to self-interested industry members was private delegation in its "most obnoxious form," constituting a due process violation). Thus, although delegating government authority to unaccountable private actors not bound by constitutional safeguards is not per se unconstitutional, it is presumptively suspect. See Pittston Co. v. United States, 368 F.3d 385, 394 (4th Cir. 2004). However, by granting KISA—a private entity whose membership is comprised of self-interested technological constituencies—vast and unchecked enforcement powers over the entire Internet industry, Congress contravenes the constitutional justifications for the private nondelegation doctrine. 55 U.S.C. § 3052(a), (d). Cf. Carter, 298 U.S. at 311. As a result, the Court must find the Act unconstitutional.

B. Delegation to a Private Entity Is Improper When There Is a Lack of Demonstrable Subordination to a Governmental Authority with Sufficient Oversight.

When a private entity is granted unfettered discretion over the establishment or enforcement of rules defining private rights, the constitutional principles described above are

undermined. See e.g., A. L. A. Schechter Poultry Corp., 295 U.S. at 537 (placing rulemaking authority entirely in the hands of a self-interested private trade association was "utterly inconsistent with the constitutional prerogatives and duties of Congress"). However, the constitutional deficiencies of private delegation can be cured by subordinating the private entity to a public body that exercises routine surveillance, such that the private power operates under the purview of a constitutionally cabined and publicly accountable government entity. See Consumers' Rsch. v. Fed. Commc'ns Comm'n, 88 F.4th 917, 926 (11th Cir. 2023) (reiterating the requirements of subordination and surveillance). But see Sierra Club v. Lynn, 502 F.2d 43, 59 (5th Cir. 1974) (subjecting private entities to mere "rubber stamping" review by a public body is insufficient).

Private entities constrained to advisory or ministerial roles supervised by public bodies are sufficiently subordinated. See, e.g., United States v. Frame, 885 F.2d 1119, 1129 (3d Cir. 1989) (finding no violation of the private nondelegation doctrine because the supervising authority had final say over the discretionary actions of the private entity—indicating an advisory role—and the private entity was only independently tasked with collecting assessments—constituting a ministerial role). In Sunshine Anthracite Coal Co. v. Adkins, delegating price-fixing authority to private coal producers was upheld because a public body was permitted to review, modify, and reject the proposed prices. 310 U.S. 381, 399 (1940). In assessing the statutory scheme, this Court held that the private entity operated merely in service to the public body, striking the proper balance of subordination and surveillance. Id. Contra Ass'n of Am. R.R. v. United States Dep't of Transp., 721 F.3d 666, 674 (D.C. Cir. 2013) (Amtrak I) (deeming unconstitutional a delegation to Amtrak, a private entity, because the supervising public agency had equal, rather than superior, discretionary power), vacated on other grounds United States Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43 (2015) (Amtrak II) (setting aside the dispute because Amtrak is a public entity).

Challenges to private delegations of authority continue to be assessed against the backdrop of both A. L. A. Schechter Poultry Corp. and Adkins. 295 U.S. 495; 310 U.S. 381. The most recent example comes from the Horseracing Integrity and Safety Act of 2020 (hereinafter "HISA"), which established the Horseracing Integrity and Safety Authority (hereinafter "the Authority"), a private entity that regulates and enforces standards for the horseracing industry. H.R.1754, 116th Cong. (2020). 15 U.S.C. § 3052. The delegation was immediately challenged in Nat'l Horsemen's Benevolent & Protective Ass'n v. Black. 53 F.4th 869 (5th Cir. 2022) (Black I). The Fifth Circuit held that the Authority was improperly subordinated and surveilled by its supervising agency, the Federal Trade Commission (hereinafter "FTC"), because the FTC could not "write the rules [promulgated by the Authority], [] change them, [or] second-guess their substance." Id. at 872. Following the decision, Congress amended HISA and granted the FTC the power to "abrogate, add to, and modify the [Authority's] rules," securing the proper subordination and surveillance that was missing from the original statutory scheme. 15 U.S.C. § 3053(e). See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415, 424 (5th Cir. 2024) (Black II) (conceding that the amendment quelled constitutional concerns). See also Oklahoma v. United States, 62 F.4th 221, 230 (6th Cir. 2023) (deeming HISA constitutional because the amendment gave the FTC "ultimate discretion," making the Authority "the secondary, the inferior, the subordinate" rule-maker); Walmsley v. Fed. Trade Comm'n, 117 F.4th 1032, 1038 (8th Cir. 2024) (same).

Notably, however, the amendment to HISA did not disengage constitutional frustrations with the statute, but rather shifted scrutiny to whether the Authority's discretionary enforcement power—to initiate investigations, impose civil sanctions, and file suit—was itself an improper private delegation. Compare Black II, 107 F.4th at 429–30 (finding the delegation of executive power unconstitutional because the Authority exercised ample discretion that went unchecked by

the FTC) with Oklahoma, 62 F.4th at 231–33 (approving of the executive delegation in a facial challenge because the FTC could presumptively act independently to limit the Authority's overbroad enforcement, constituting "pervasive oversight and control") and Walmsley, 117 F.4th at 1039 (agreeing with the Sixth Circuit). This Court now considers the same constitutional challenge, albeit in the context of a different but no less offensive statutory scheme.

C. Under KISKA, the FTC Cannot Sufficiently Subordinate or Surveil KISA's Delegated Enforcement Authority.

In assessing the viability of private delegations of executive power, the constitutional inquiry considers whether the scheme ensures that a "private entity [is not] the principal decisionmaker in the use of federal power." Oklahoma, 62 F.4th at 229. The prime example of a sufficiently subordinated and surveilled private delegation of enforcement powers is found in the Maloney Act of 1938, which established the Financial Industry Regulatory Authority (hereinafter "FINRA")—a private, self-regulatory organization overseeing compliance with securities law—to report to the Securities and Exchange Commission (hereinafter "SEC"). 15 U.S.C. § 78o-3(k)(1). See, e.g., Todd & Co. v. Sec. & Exch. Comm'n, 557 F.2d 1008, 1012 (3d Cir. 1977) (upholding the delegation of enforcement powers to FINRA because the SEC adequately surveils the entity through its superior enforcement authority). The Maloney Act has circumvented constitutional conflicts with the private nondelegation doctrine by exclusively granting the SEC the weightiest enforcement power—the power to file civil suit—and by allowing the agency to unilaterally revoke the enforcement capacity of FINRA if necessary. Id. See Black II, 107 F.4th at 434 (distinguishing FINRA's powers from the Authority's under HISA). See also Buckley v. Valeo, 424 U.S. 1, 138 (1976) (holding that because the power to file suit does not "aid [] the legislative function of Congress," it is too profound to be delegated from the executive).

The Fourteenth Circuit was correct to highlight the similarities in the private delegations of power established under HISA and KISKA, which were both modeled after the FINRA–SEC relationship. R. at 6, 12. However, this comparison says little about the constitutionality of the delegation of KISA's enforcement powers, which is unresolved in the context of HISA following the conflicting decisions of Oklahoma and Black II. 62 F.4th 221; 107 F.4th 415. Under KISKA, KISA has the delegated authority to present subpoenas, conduct investigations, impose civil sanctions, and file suit for injunctive relief—a distinct set of executive powers, as opposed to legislative. See 55 U.S.C. § 3054(c) (investigatory powers); 55 U.S.C. § 3054(j)(1)-(2) (filing of civil suits); 55 U.S.C. § 3057(b) (sanctioning authority). See also Black II, 107 F.4th at 431 (recognizing this same set of powers under HISA to be executive in nature). However, unlike under the Maloney Act, the FTC is *not* granted the same enforcement capacity as KISA, nor is it able to revoke KISA's authority for misbehavior. 55 U.S.C. § 3053. Cf. Black II, 107 F.4th at 434 (same under HISA). As a result, Congress' delegation of such expansive *independent* authority to KISA cannot be upheld merely because it is predicated upon the constitutionally accepted FINRA–SEC relationship. Contra Todd & Co., 557 F.2d at 1012.

Although KISA's regulatory power to propose rules subject to final review by the FTC may be considered merely advisory, and its assessment and fee collection duties merely ministerial, the same cannot be said of its expansive enforcement authority. 55 U.S.C. § 3053; 55 U.S.C. § 3052(f)(1)(C). Cf. Frame, 885 F.2d at 1129. That force grants KISA—a private entity intended to function in service to the government—the unilateral discretion to decide against whom its rules will be enforced and the extent of the punishment enacted, without any meaningful oversight or opportunity for intervention by the FTC. Cf. Buckley, 424 U.S. at 138 (emphasizing the significance of the power to bring suit). Contra First Jersey Sec., Inc. v. Bergen, 605 F.2d 690,

697–99 (3d Cir. 1979) (approving the Maloney Act's delegation of executive authority because the SEC, *not* FINRA, had ultimate control over discretionary enforcement); Sorrell v. Sec. & Exch. Comm'n, 679 F.2d 1323 (9th Cir. 1982) (same). Thus, because KISA has ample latitude to act independently from the FTC in its enforcement, and because the FTC's minimally prescribed surveillance is insufficient, Congress' delegation of executive power unconstitutionally condones "delegation running riot." A. L. A. Schechter Poultry Corp., 295 U.S. at 553 (Cardozo, J., concurring). Such a broad delegation of authority to a private entity with minimal oversight violates the private nondelegation doctrine, rendering KISA unconstitutional.

i. The FTC's Power to Revise KISA Rules Does Not Provide Supervision Over KISA's Enforcement Powers.

The Sixth Circuit incorrectly attaches an inordinate amount of faith in the FTC's capacity under HISA to oversee the Authority's enforcement power, clinging to the Commission's ability to "abrogate, add to, and modify" the Authority's regulations. Oklahoma, 62 F.4th at 231 (suggesting that the FTC could shape the Authority's rules to reign in the use and reach of its delegated enforcement powers). However, as identified by the Fifth Circuit in Black II, that rule revision power extends only to cure the constitutional deficiencies of the delegation of legislative, *not* executive, power. 107 F.4th at 431. Stubbornly, the Sixth Circuit goes on to suggest that the FTC could utilize its independent rulemaking power to counteract any executive overreach by the Authority. Oklahoma, 62 F.4th at 231. The Fifth Circuit correctly counters by stating that the FTC's powers must be confined to HISA's statutory grant of authority, which does *not* include independent rulemaking. See generally J. W. Hampton, Jr., & Co., 276 U.S. 394 (limiting the delegation of governmental power to agencies). To suggest otherwise would sanction the FTC to "alter [the] statutory division of labor" and augment its own power. See Black II, 107 F.4th at 431–32; Biden v. Nebraska, 600 U.S. 477, 494 (2023) (finding that although the Secretary of Education

had the delegated authority to modify a statute, that "[did] not authorize 'basic and fundamental changes in the scheme' designed by Congress"). Contra Walmsley, 117 F.4th at 1040 (distinguishing Biden because the authority to "add to" is greater than the authority to "modify").

Although the FTC can "abrogate, add to, and modify the rules" proposed by KISA, as is the case under HISA, that entitlement does not extend to surveil KISA's enforcement decisions. 55 U.S.C. § 3053(e). Cf. Consumers' Rsch., 88 F.4th at 928 (considering whether the supervising governmental authority had "deep and meaningful control" over *all* power exercised by the private entity). Assuming KISA even has the power to promulgate rules defining its right to investigate, impose sanctions, and file suit—which is not clearly prescribed under 55 U.S.C. § 3053(a)—the FTC could revise such rules before enacted. But, in doing so, the FTC would only be exercising its surveillance over KISA's *legislative* power. Cf. Black II, 107 F.4th at 431. That much is made clear by KISKA itself, which codifies the FTC's oversight of KISA's *legislative* authority—including the power to revise rules—under 55 U.S.C. § 3053. The FTC's minimal surveillance over KISA's *enforcement* authority is separately accounted for under 55 U.S.C. § 3058—which makes no mention of the power to "abrogate, add to, and modify." Cf. Gundy v. United States, 588 U.S. 128, 129 (2019) ("[A] nondelegation inquiry always begins (and often almost ends) with statutory interpretation."). Thus, statutory interpretation reveals that the FTC's revision power does *not* extend to supervise KISA's enforcement, as acknowledged by the Fifth Circuit in the context of HISA. Cf. Black II, 107 F.4th at 431.

Further, extending the Sixth Circuit's logic to suggest that the FTC could independently issue rules to curtail KISA's overbroad enforcement, although inventive, finds no support in the statute. Contra Oklahoma, 62 F.4th at 231. The FTC's powers are confined by the delegation provided for under KISKA, which only permits independent rulemaking by the Commission in

two contexts: to establish subjects for which KISA may issue guidance, and to specify the conduct of hearings by an administrative law judge. 55 U.S.C. § 3054(g)(1)(B); 55 U.S.C. § 3058(b)(2)(B). This independent rulemaking is extremely limited and does not encompass the authority to issue rules redefining the Authority's enforcement power. 55 U.S.C. § 3054(a)(1) (requiring the FTC to "implement and enforce" KISKA *only* "within the scope of their powers and responsibilities under this chapter"). Thus, the Oklahoma and Walmsley decisions misunderstand the fact that even though the FTC can add to the Authority's rulemaking, it cannot add to its own grant of statutory authority. 62 F.4th at 231; 117 F.4th at 1040. The same can be said in the context of KISKA. In fact, requiring that the FTC act beyond the scope of the statute to rectify the overbroad grant of private enforcement power to KISA "would let the agency rewrite the statute," which merely supplants one constitutional violation with another. Cf. Black II, 107 F.4th at 431; Biden, 600 U.S. at 494. Therefore, the only tenable conclusion is that the FTC's revisionist powers fail to surveil KISA's executive power, constituting a violation of the private nondelegation doctrine.

ii. The FTC's Power of Review Over KISA's Enforcement Actions Is Too Limited and Insulated to Meaningfully Surveil the Private Entity.

The oversight of civil sanctions imposed by KISA is confined to *de novo* review by an administrative law judge (hereinafter "ALJ") "on application by the [FTC] or a person aggrieved." 55 U.S.C. § 3058(b)(1). The ALJ's decision is then reviewable *de novo* and on a discretionary basis by the FTC. 55 U.S.C. § 3058(c). Such review does *not* extend to consider KISA's use of its exclusive investigatory powers, or of its power to bring suit, leaving both unchecked and primed for abuse. Contra Black II, 107 F.4th at 434 (noting that FINRA's limited enforcement powers are shared with the SEC, who alone has the superior power to bring suit). Nonetheless, KISKA provides for broad review by the FTC of ALJ decisions regarding KISA enforcement actions, allowing the consideration of additional evidence in reviewing both questions of law and fact to

decide whether to "affirm, reverse, modify, set aside, or remand for further proceedings." 55 U.S.C. § 3058(c)(3). However, even though the FTC can request review by an ALJ to then access its power of *de novo* review, this layered approach detrimentally insulates KISA's accountability by preventing the FTC from exercising direct control over its purported subordinate. 55 U.S.C. § 3058(b)(1). Contra R. H. Johnson & Co. v. Sec. & Exch. Comm'n, 198 F.2d 690, 695 (2d Cir. 1952) (approving a structure of direct review by the SEC over FINRA's enforcement powers).

Even though KISA has greater enforcement power than FINRA—extending as far as the power to bring suit—the FTC has more restricted surveillance powers than the SEC, which is an inexplicable mismatch. Cf. Black II, 107 F.4th at 434; Buckley, 424 U.S. at 138. Unlike the SEC's power of direct review over FINRA, the FTC is only permitted to review the decisions made by an ALJ. See 15 U.S.C. § 78s(d)(2) ("Any [enforcement] action with respect to which a self-regulatory organization [FINRA] is required . . . to file notice shall be subject to [direct] review by the appropriate regulatory agency [SEC]."). Cf. R. H. Johnson & Co., 198 F.2d at 695. Given that the FTC has only once undertaken *de novo* review of a KISA enforcement action and chose not to intervene, it can be inferred that the agency is not best situated to second-guess the decisions of an ALJ. R. at 3. Contra id. Even if it were so positioned, the FTC's limited review fails to directly reach the private entity it was tasked with overseeing, such that the exercise amounts to a fruitless feat not worth pursuing. Thus, to the extent Congress provided the FTC with any surveillance over KISA's enforcement, it is superficial at best. Contra R. H. Johnson & Co., 198 F.2d at 695. As a result, KISA operates in violation of the private nondelegation doctrine.

iii. Because the FTC Cannot Intervene Before an Enforcement Action Is Commenced by KISA, the Private Entity Is Not Properly Subordinated.

Contemporaneous and meaningful oversight by a politically accountable public entity is paramount in the context of private delegations of executive powers to ensure that those subject to

enforcement can rely on robust structural and governmental protections. See Amtrak II, 575 U.S. at 57 (Alito, J., concurring) ("Liberty requires accountability."). Thus, the Fifth Circuit was correct to conclude that the Authority's power under HISA to "launch an investigation into [rule violators], subpoena [their] records, search [their] facilities, charge [them] with a violation, adjudicate it, and fine [them]," all *before* the FTC can step in, fails to subordinate or surveil the private entity. Black II, 107 F.4th at 430. Walmsley, 117 F.4th at 1042 (Greunder, J., dissenting) ("[B]y the plain text of the statute, the FTC cannot impede upon the [enforcement] power granted to the Authority . . . ."). Such a broad display of power by a private actor without the possibility of governmental intervention or reversal confirms that the private party is acting independently, rather than in service of or subordinate to a public body. Cf. Adkins, 310 U.S. at 399.

KISKA provides KISA the same unending grant of executive authority described in Black II without any contemporaneous opportunity for intervention by the FTC. 107 F.4th at 430. 55 U.S.C. § 3054(c). Because the FTC's *de novo* review applies *only* to the imposition of penalties, and *only after* said penalties have been imposed, that power does not suffice to adequately subordinate KISA to the FTC. 55 U.S.C. § 3054(j)(1)-(2). Cf. Adkins, 310 U.S. at 399. By the time the capacity to exercise this limited interventionist mechanism is available to the FTC, KISA may have already abused its enforcement power—by way of overbroad subpoenas or punitive searches, for example—which cannot be reviewed or retroactively remedied.

Further, as under HISA, stays of final civil sanctions are not automatically granted under 55 U.S.C. § 3058(d), such that alleged violators of KISA's rules may be forced to take drastic measures to pay hefty fines *before* the FTC has had a chance to review and remedy any errors. Cf. Black II, 107 F.4th at 430. Using the fines imposed under Rule ONE as an example—amounting to $10,000 per day of noncompliance, with the potential for an additional $250,000 fine—a

negative finding following a KISA enforcement action could suffice to coerce corporate reorganizations, mass layoffs, or even bankruptcy by PAC members. 55 C.F.R. § 4(b). Even if the FTC were to eventually provide relief or a stay of the penalty to alleged violators, the assistance would be too little too late. Cf. Walmsley, 117 F.4th at 1042. Under no conception of the private nondelegation doctrine's precedent could such an unyielding display of unaccountable power be considered properly subordinated. Cf. Adkins, 310 U.S. at 399; Black II, 107 F.4th at 430. Thus, the Court must intervene and find the Act's sweeping delegation of authority unconstitutional.

D. KISA's Unaccountable Enforcement Authority Is Predicated Upon Skewed Incentive Structures That Encourage Misbehavior.

To counteract teeming self-interest by private parties with delegated regulatory and enforcement authority, courts have counseled neutral and unbiased control over the membership of the private entity wielding government power. See, e.g., Black II, 107 F.4th at 435 (rejecting a due process challenge against HISA for allowing "economically self-interested actors to regulate their competitors" because the statute's conflicts of interest provision flatly prohibits that possibility); First Jersey Sec., Inc., 605 F.2d at 699 (acknowledging that FINRA members pursuing enforcement actions can be disqualified for "personal interest" in the outcome).

Statutory safeguards intended to suppress personal interests are plainly absent from KISKA. For one, the statute's conflicts of interest provision is too diluted to prevent manifestations of abuse. 55 U.S.C. § 3052(e). Although the clause prohibits "[p]ersons with a present financial interest" from Board membership, it explicitly permits membership by present employees of KISA's regulated entities. Contra 15 U.S.C. § 3052(e) (prohibiting Board membership under HISA by employees, representatives, and policymakers of the regulated industry). In turn, through Board membership, industry employees can implement binding safety standards and associated penalties against competitors to divert Internet traffic from specific websites, which parallels the very source

of constitutional concern in Carter. 298 U.S. at 311. Despite the evident insufficiency of this conflicts of interest provision, the FTC has no power to remove or temporarily sideline Board members with vested personal interests in the outcome of a KISA enforcement action, of which there are likely many. Contra First Jersey Secur., Inc., 605 F.2d at 699.

Even more, because the fees and fines imposed by KISA comprise a significant source of the Association's funding, rigorous enforcement against competitors is incentivized—even rewarded—in order to sustain the entity's continued operation. 55 U.S.C. § 3052(f). KISA is also allowed to seek investigatory and enforcement assistance from "non-profit child protection organizations," inviting the use of government authority by *additional* self-interested private entities even further removed from FTC oversight than KISA. 55 U.S.C. § 3054(e). Such an injudicious statutory feature finds no comparison in HISA. 15 USCS § 3054(e)(1)(A) (sanctioning enforcement collaboration under HISA between the Authority and the United States Anti-Doping Agency, a governmental entity). Combined, these components of KISKA reveal blatant disregard for the constitutional precepts of the private nondelegation doctrine meant to combat unaccountable overreach by private entities. A. L. A. Schechter Poultry Corp., 295 U.S. at 537. By vesting such broad enforcement powers in a self-interested private entity that is neither sufficiently subordinated nor surveilled by a public body, Congress has violated the private nondelegation doctrine. Thus, it is the duty of this Court to find the Act unconstitutional.

II. RULE ONE VIOLATES THE FIRST AMENDMENT BY IMPERMISSIBLY RESTRICTING ADULT ACCESS TO CONSTITUTIONALLY PROTECTED SPEECH.

A. Rule ONE is Subject to Strict Scrutiny Because It Is a Content-Based Restriction on Adult Access to Material Protected by the First Amendment.

As this Court astutely stated in Texas v. Johnson, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an

idea simply because society finds the idea itself offensive or disagreeable." 491 U.S. 397, 414 (1989). Under the First Amendment's free speech protections, the Government, or any entity acting in a government capacity, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." U.S. Const. amend. I. Ashcroft v. Am. C.L. Union, 535 U.S. 564, 573 (2002) (Ashcroft I) (internal quotation marks omitted). Since "[c]ontent-based regulations [of speech] are presumptively invalid," they are upheld only if they survive strict scrutiny. See R.A.V. v. St. Paul, 505 U.S. 377, 392 (1992); Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

Because the prohibition of speech is "uniquely harmful to a free and democratic society," laws that regulate speech or expressive conduct are subjected to a lower standard of review only in a limited number of circumstances. Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175, 187 (2024). For instance, content-neutral laws that restrict the time, place, or manner of speech may be subjected to intermediate scrutiny. See, e.g., Cox v. New Hampshire, 312 U.S. 569, 574 (1941) (approving a content-neutral law requiring special licenses for parades down public streets because it was a time, place, and manner restriction). And certain "well-defined and narrowly limited classes of speech" may permissibly be restricted because of the content espoused. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 791 (2011). See, e.g. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (fighting words); Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (incitement to violence). One such narrow First Amendment exception is obscenity, or "prurient, patently offensive depiction[s] . . . of sexual conduct" that lack "serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 26 (1973).

Significantly, "sex and obscenity are not synonymous," and most material depicting sex or nudity is protected under the First Amendment. Roth v. United States, 354 U.S. 476, 487 (1957). See also Jenkins v. Georgia, 418 U.S. 153, 155 (1974) (finding that a sexually explicit film was

protected speech); Playboy, 529 U.S. at 811 (affirming that adults have a constitutional right to access pornographic television). Even if some consider the sexual material that falls outside of Miller's narrow obscenity exception to be offensive or distasteful, the First Amendment offers broad protection to the controversial as well as the mainstream. Counterman v. Colorado, 600 U.S. 66, 87 (2023) ("First Amendment vigilance is *especially* important when speech is disturbing, frightening, or painful, because the undesirability of such speech will place a heavy thumb in favor of silencing it.") (emphasis added).

Freedom of speech is a cornerstone of American society, protecting a person's right to think, discuss, debate, and express oneself freely. Rule ONE infringes upon the First Amendment's promise, limiting adult access to sexually explicit material merely because of its controversial nature. This heavy-handed legislative act is an overbroad content-based restriction on adults' right to speech, and as such, it impermissibly infringes upon the First Amendment.

i. While Ginsberg v. New York Remains Good Law, Its Rational Basis Standard Applies Only to Burdens on Children's Access to Unprotected, Obscene Material.

The Fourteenth Circuit adopted the Fifth Circuit's view in Free Speech Coal., Inc. v. Paxton that Ginsberg v. New York mandates rational basis review, not strict scrutiny, for age verification laws such as Rule ONE. 95 F.4th 263, 289 (5th Cir. 2024); 390 U.S. 629, 634 (1968). R. at 8. The Fifth Circuit, however, mischaracterizes Ginsberg's central holding. 390 U.S. at 634. Ginsberg concerned a New York state criminal obscenity statute prohibiting the sale of pictures or magazines that were "harmful to minors." Id. at 632. Applying rational basis review, this Court held that the law did not violate the First Amendment because the implicated material was obscene for its intended audience—children. Id. at 637 ("We cannot say that the statute invades the area of freedom of expression constitutionally secured to minors."). But unlike Rule ONE, the penal law in question in Ginsberg operated "without denying adults any constitutionally protected speech."

PSINet v. Chapman, 362 F.3d 227, 254 (4th Cir. 2004). Indeed, the constitutional rights of adults were never at issue; the case only served to reaffirm that a state may afford minors a "more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see." Ginsberg, 390 U.S. at 634–37 (recognizing that the material was not obscene for adults and that the law did not implicate adults' First Amendment rights).

Notably, a line of subsequent cases found that the same limitations established by the penal law in Ginsberg could not be placed on *adult* access to sexually explicit material, even when that material is inappropriate for children. See generally Sable Commc'ns of California v. Fed. Commc'ns Comm'n, 492 U.S. 115 (1989) (striking down a law prohibiting indecent intrastate telephone communications for denying adult access to constitutionally protected speech); Reno v. Am. C.L. Union, 521 U.S. 844 (1997) (finding the Communications Decency Act (hereinafter "CDA"), a law criminalizing transmission of obscene and indecent materials to minors online, an unconstitutional, overbroad, undue burden on adult speech); Playboy, 529 U.S. at 803 (invalidating a law requiring television providers to block sexually explicit programming because it was not the least restrictive alternative); Ashcroft v. Am. C.L. Union, 542 U.S. 656 (2004) (Ashcroft II) (deeming the Child Online Protection Act (hereinafter "COPA") invalid because less restrictive means were available to pursue the same ends without burdening adult speech). Because each of these cases dealt with content that was constitutionally protected for adults, strict scrutiny applied.

The Court's well-established rule that strict scrutiny, not rational basis review, applies to laws burdening adult access to sexually expressive content, however, is of no matter in Paxton. 95 F.4th at 263. The Fifth Circuit squares its disregard for Supreme Court precedent by declaring that the Ashcroft II decision contains "startling omissions," ultimately concluding the Court merely "ruled on the issue the parties presented: *whether* COPA would survive strict scrutiny." 95 F.4th

at 274 (emphasis added). But this reasoning cannot be correct. If it were, Justice Scalia would not have asserted that "both the Court and Justice Breyer err . . . in *subjecting* COPA to strict scrutiny." Ashcroft II, 542 U.S. at 676 (Scalia, J., dissenting) (emphasis added). It is far more likely that the Ashcroft II Court did not feel the need to revisit what was already clearly established in Reno and Sable, which is that strict scrutiny affirmatively applies to laws that chill adult access to speech on the basis that the content is harmful for minors. 521 U.S. at 844; 492 U.S. at 115. See also Paxton, 95 F.4th at 299 (Higginbotham, J., concurring in part and dissenting in part) ("This Court cannot fault Ashcroft II for applying the level of scrutiny clearly established by Sable and Reno, or for declining to engage in repetitive analysis.").

Properly analyzed, Ginsberg affirms the government's ability to narrow a *minor*'s right to access sexually explicit material unprotected for that age group. 390 U.S. 629. However, the case does not challenge the proposition that strict scrutiny presumptively applies when a policy limits an adult's right to constitutionally protected material. Id. In fact, it does not even consider adult speech at all. Id. See also Am. Booksellers v. Webb, 919 F.2d 1493, 1501 (11th Cir. 1990) (recognizing that the statute in Ginsberg "did not implicate the First Amendment rights of adults"). As such, the proper inquiry before the Court is clear: whether Rule ONE is a content-based restriction of adult speech and whether the material implicated by the regulation is constitutionally protected. Because it is so, strict scrutiny applies.

ii. Blanket Restrictions on Adult Access to Material Harmful to Minors Have Historically Been Recognized as Content-Based.

"Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed." Reed, 576 U.S. at 163. Laws that focus "only on . . . content . . . and the direct impact that speech has on its listeners" are "the

essence of content-based regulation." Playboy, 529 U.S. at 811–12. Strict scrutiny applies equally to content-based burdens and content-based bans. Id. at 811.

If a law burdens adults' ability to access speech based upon the fact that it is indecent for minors, it is a content-based restriction triggering strict scrutiny. See, e.g., Sable, 492 U.S. at 131 (applying strict scrutiny where the law burdened "the content of adult telephone conversations"); Playboy, 529 U.S. at 811 (limiting cable pornography to hours when children were likely asleep was an impermissible content-based restriction because it cannot be justified without reference to the content of the speech). Rather than merely limiting children's access to evocative or explicit material, this Court has consistently found blanket restrictions on the availability of material deemed inappropriate for children to be content-based because it singles *adult* speech out for regulation based upon its "effect . . . on young viewers." Playboy, 529 U.S. at 811.

Whether a policy imposing age restrictions on the dissemination of sexual material impermissibly burdens adult access to speech often depends on whether the law deals with electronic media (say, the internet or broadcast television) or brick-and-mortar stores. Compare Ginsberg, 390 U.S. at 631 (finding that ID requirements for over-the-counter sales of "girlie" magazines only burdened minors, which was permissible) with Ashcroft II, 542 U.S. at 663 (requiring age verification when posting speech "harmful to minors" online placed unacceptable burdens on adult access to speech) and Reno, 521 U.S. at 855 (recognizing that, unlike over-the-counter sales, there is "no effective way to determine the age or identity of a user [online]" in finding the CDA to burden adult speech). As discussed above, when a policy regulating speech due to its unsuitability for minors burdens adult access to constitutionally protected material, it is considered content-based and therefore subject to strict scrutiny.

Indeed, the Court's review of Congress's two previous attempts to regulate the dissemination of sexually explicit material to minors online—first in Reno and later in Ashcroft II—are the most relevant comparisons to Rule ONE. Congress passed the CDA in 1996, criminalizing the "knowing" transmission of "obscene or indecent" messages to minors online. Reno, 521 U.S. at 868. This Court found that the CDA was a "content-based blanket restriction on speech," sweeping across the internet with the purpose of regulating the impact of speech on listeners. Id. In the wake of Reno, Congress rewrote the CDA, this time barring the knowing posting, "for commercial purposes," of online content that is "harmful to minors" without proper age verification measures. Child Online Protection Act (hereinafter "COPA"), 47 U.S.C. § 231. When challenged, the law was again treated as a content-based restriction on speech and found to be invalid. Ashcroft, 542 U.S. at 660 ("The Constitution demands that content-based restrictions on speech be presumed invalid.").

Rule ONE, like the nearly identical Texas state law evaluated by the Fifth Circuit in Paxton, is "strikingly similar" to both the CDA and COPA in its purpose and reach. 95 F.4th at 298 (Higginbotham, J., concurring in part and dissenting in part). See 2023 Tex. Gen. Laws 676. Like the CDA and COPA, Rule ONE "applies broadly to the entire universe of cyberspace," restricting access to any commercial website that publishes or houses "sexual material harmful to minors." Reno, 521 U.S. at 868. 55 C.F.R. § 2(a). Rule ONE intends to "protect children from the primary effects of 'indecent' and 'patently offensive' speech," but it lacks justification without referring to the content of the regulated speech. Reno, 521 U.S. at 868; Playboy, 529 U.S. at 811–12. Finally, Rule ONE defines "sexual material harmful to minors" in a similar fashion to both laws. 55 C.F.R. § 1(6). See Paxton, 95 F.4th at 298–99 (Higginbotham, J., concurring in part and dissenting in part) (finding regulated speech under Texas' law to be parallel to regulated speech under COPA and the

CDA). Thus, as in the cases of COPA and the CDA, Rule ONE is a content-based restriction for which strict scrutiny presumptively applies. Playboy, 529 U.S. at 814.

iii. Rule One Impermissibly Regulates First Amendment-Protected Material, as Its Language Sweeps Much Further Than the Definition of Obscenity Set Forth in Miller v. California.

Obscene material, as defined by Miller, is unprotected by the First Amendment. 413 U.S. at 23. Regulations of the materials that would be obscene from the point of view of *minors*, however, "cannot impede an adult's ability to see the same material without triggering heightened scrutiny [if] the material retains some First Amendment protection." Free Speech Coal., Inc. v. Rokita, No. 1:24-cv-00980-RLY-MG, 2024 U.S. Dist. LEXIS 114028, at *25 (S.D. Ind. June 28, 2024) (published); Butler v. Michigan, 352 U.S. 380, 383 (1957) ("[T]he government may not 'reduce the adult population . . . to reading only what is fit for children.'") (citations omitted).

Perhaps the Fourteenth Circuit would have rightly employed rational basis review if Rule ONE merely regulated unprotected obscenity, but most material covered by Rule ONE is sexually expressive content that adults have a constitutional right to receive. Like similar state laws in Indiana and Texas, Rule ONE defines "sexual material harmful to minors" by "adding 'with respect to minors' or 'for minors' to the well-established Miller test for obscenity." Paxton, 95 F.4th at 267. In so doing, however, Rule ONE defines a category of information that sweeps far beyond what is obscene for adults and limits access on that basis. See United States v. Stagliano, 693 F. Supp. 2d 25, 32 (D.C. Cir. 2010) (burdening material harmful to minors "threaten[s] greater overbreadth because it regulate[s] far more than obscenity"); Rokita, 2024 U.S. Dist. LEXIS 114028, at *26 (imposing age restrictions on material harmful to minors burdens constitutionally protected speech for adults).

Moreover, Rule ONE imposes exacting penalties on any website that publishes or distributes more than merely "one-tenth . . . sexual material harmful to minors" without age

verification barriers. 55 C.F.R. § 2(a). Cf. 2023 Tex. Gen. Laws 676 (imposing a less restrictive rule, only penalizing websites with a considerable one-third harmful content); Ind. Code Ann. § 24-4-23-1 (2024) (same). These blanket provisions "trigger[] age verification requirements regardless of the content the viewer seeks to access." Rokita, 2024 U.S. Dist. LEXIS 114028, at *29. Because Rule ONE covers broad swaths of constitutionally protected material—including material appropriate for minors—the obscenity exception is inapplicable and there is no basis to apply a lowered standard of review herein. See Am. C.L. Union v. Mukasey, 534 F.3d 181, 187 (3d Cir. 2008) (ACLU III) (applying strict scrutiny to COPA because material that is "harmful to minors" remains constitutionally protected for adults). Therefore, Rule ONE is a content-based restriction that falls within the ambit of First Amendment protection, and strict scrutiny must apply.

B. Rule ONE is an Overbroad Restriction on Speech that Fails Strict Scrutiny.

For a law to satisfy strict scrutiny, the Government must show that any restriction of non-obscene expression is "narrowly drawn" to further a "compelling interest" and that the burden imposed amounts to the "least restrictive means" available to further that interest. Sable, 492 U.S. at 126. A burden on speech is unacceptable if "less restrictive alternatives would be at least as effective in achieving the Act's legitimate purposes," and the Government bears the burden of showing these alternatives are ineffective. Reno, 521 U.S. at 874. See also Playboy, 529 U.S. at 817 (affirming the Government's burden). Additionally, to be "narrowly tailored," the statute may not be impermissibly overbroad or underinclusive. ACLU III, 534 F.3d at 193–204.

It is not in dispute that the Government has a compelling interest in "protecting the physical and psychological wellbeing of minors." Sable, 492 U.S. at 126. Nonetheless, the Constitution's fundamental freedoms do not fold in the face of decent policy; strict scrutiny applies despite the compelling interest to shield minors. Id. ("[The Government] may serve this legitimate interest,

but to withstand constitutional scrutiny, it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.").

i. Rule ONE is Not Narrowly Tailored to Advance the Government's Compelling Interest.

By prescribing age verification technology, Rule ONE presents the same narrow tailoring issues as seen in COPA. See ACLU III, 534 F.3d at 192 (finding that COPA's affirmative defenses, which shielded Web publishers from criminal liability if they implemented age restriction technology in the form of credit card or other ID, were a problematic deterrent). In the case of COPA, the Third Circuit, upon remand, concluded that "[t]he effect of the affirmative defenses . . . is to drive this protected speech from the marketplace of ideas on the internet." Id. at 193. Thus, because it was not narrowly tailored, the regulation was deemed impermissible. Id

Indeed, the Third Circuit was correct in its assessment that age restriction barriers "will likely deter many adults from accessing restricted content, because Web users are simply unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is sensitive or controversial." Id. at 192. The chilling landscape of mass data collection, breaches, and surveillance has only intensified online privacy concerns in the intervening fifteen years. See Free Speech Coal., Inc. v. Colmenero, 689 F. Supp. 3d 373, 398–99 (W.D. Tex. Aug. 31, 2023) (reaching the same factual conclusions regarding age verification as in the COPA litigation). Thus, it is unsurprising that restrictive state laws like Rule ONE have driven traffic away from pornography websites by eighty percent. R. at 4. This impact is inevitable given that sixty-six percent of Americans are not comfortable with sharing their identification documents or biometric information with online platforms. Rokita, 2024 U.S. Dist. LEXIS 114028, at *3. Among them include Jane and John Doe, who have stopped visiting sites that require intrusive identification information due to fear of data breaches and loss of anonymity. R. at 4.

Finally, by applying age restrictions to any website that contains merely one tenth "sexual material harmful to minors," Rule ONE implicates a huge amount of non-obscene material, severely chilling speech. Cf. Playboy, 529 U.S. at 839 (finding no comparable narrow tailoring issue to Reno because the law "only concerned regulation of commercial actors who broadcast virtually 100% sexually explicit material") (internal quotations omitted). Even websites that principally distribute adult entertainment contain "significant amount[s] of non-obscene material," ranging from "clothed" and "partially clothed modeling galleries," to "podcasts by creators in the community discussing their work," to discussion boards including political arguments on policies like Rule ONE. Rokita, 2024 U.S. Dist. LEXIS 114028, at *5. But most sinister is Rule ONE's application to social media platforms, websites which promote political discourse, facilitate discussion, encourage creativity and self-expression, and provide a host of other First Amendment-protected activities. The overbreadth of the one-tenth requirement means these websites would now find themselves behind age verification walls. Id. at *6 (finding that Reddit, a popular internet forum, houses approximately twenty-four percent obscene material and would thus be subject to Indiana's age verification requirements); Colmenero, 689 F. Supp at 394–95 (finding that Texas' law, which is less restrictive than Rule ONE, could threaten access to Reddit, Instagram, Facebook, YouTube, or even websites that stream prurient R-rated movies).

ii. The District Court Below Accepted Multiple Less Restrictive Alternatives to Rule ONE.

Because Rule ONE's age verification technology imposes a heavy financial burden on companies and a massive privacy infringement on users, the Government's burden to prove the efficacy of Rule ONE as compared to its alternatives is high. Reno, 521 U.S. at 879 ("The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . . ."). This is especially true

because the District Court for the District of Wythe already accepted that two less restrictive alternatives to Rule ONE exist: (1) requiring Internet providers to block content until adults "opt out" and (2) "content filtering" that places adult controls on children's devices. R. at 15.

The availability of filtering technology in particular has long been a death knell for blanket restrictions on adult access to constitutionally protected, sexually explicit speech. See Reno, 521 U.S. at 877 (finding that user-based software is a reasonably effective alternative); Ashcroft II, 542 U.S. at 667–68 (noting that filtering technology is less restrictive than COPA and that a COPA-created Commission unambiguously found filters to be more effective than age verification requirements). In fact, as early as 1999, it was found that filters successfully block about ninety-five percent of sexually explicit material, whereas age verification is likely less successful because it is not proactive. ACLU III, 534 F.3d at 201. More recent cases have come to the same factual conclusion as the district courts in Reno and Ashcroft—that "[filtering and blocking software] offers advantages over age verification requirements." Rokita, 2024 U.S. Dist. LEXIS 114028, at *10. The District Court for the District of Wythe reached the same conclusion, acknowledging that Rule ONE is not narrowly tailored. R. at 15.

iii. Rule ONE is Underinclusive.

A law is underinclusive when "judged against its asserted justification . . . [it] raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." Brown, 564 U.S. at 802. Under inclusiveness alone is enough to deem a speech restriction unconstitutional. Id.

Rule ONE, like its state law counterparts, does "little to stop minors from being able to access harmful materials because minors can easily circumvent the Act." Rokita, 2024 U.S. Dist. LEXIS 114028, at *40. For one, Virtual Private Network ("VPN") technology allows users to disguise their IP addresses to pretend to be someone or somewhere else for little to no cost.

R. at 15. Id. at *9–10. In fact, the "online pornography that is most readily available to minors" is through visual search engines which pull explicit images from websites, whether those sites are age-protected or not. Colmenero, 689 F. Supp at 393. Rule ONE expressly does *not* apply to these (or any) search engines, and users may easily turn off safe search if they hope to access pornographic images. 55 C.F.R. § 5. See also Rokita, 2024 U.S. Dist. LEXIS 114028, at *9–10. And notably, Rule ONE's state law precursors affected pornography consumption not by driving it down, but by pushing users toward noncompliant, often illegal websites that promulgate harmful, non-consensual content. See Hana Ikramuddin, What is House Bill 1181 and why did Pornhub disable services in Texas, HOUS. CHRON. (Mar. 15, 2024) ("[Users] just very easily moved to pirate, illegal, or other non-compliant sites that don't ask visitors to verify their age.").

Thus, even though Rule ONE serves a compelling interest, by failing to mitigate both the overbreadth and under inclusiveness of its restriction, and by failing to reconcile less restrictive, easily available alternatives, the regulation necessarily fails strict scrutiny. Therefore, as a content-based burden on adult access to constitutionally protected speech, Rule ONE impermissibly infringes on the First Amendment. The Court must find the regulation unconstitutional.

CONCLUSION

Because KISA's unchecked enforcement powers constitute a violation of the private nondelegation doctrine, and because Rule ONE impermissibly infringes upon the First Amendment rights of American adults, the Court must find both unconstitutional. Disregarding the text of KISKA, the Fourteenth Circuit erroneously suggested that the FTC may exercise its revisionist power over KISA's enforcement decisions. In actuality, the FTC is granted an extremely limited, insulated power of *de novo* review of such actions. As a result, KISA is not properly surveilled or subordinated by a publicly accountable government entity, affording the private entity

unilateral capacity to enforce its rulemaking against the entire Internet industry without accountability. Additionally, the Fourteenth Circuit erroneously applied rational basis review to a content-based restriction of constitutionally protected speech. Applying the proper standard of strict scrutiny, the Court should find that Rule ONE is both overbroad and underinclusive and thereby violates the First Amendment. Thus, because KISA's unchecked enforcement powers constitute a violation of the private nondelegation doctrine, and because Rule ONE impermissibly infringes upon the First Amendment, Petitioner requests this Court deem both unconstitutional.